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MEMORANDUM FOR: Director of Congressional Affairs

FROM: Robert W. Magee  
Director of Personnel

SUBJECT: Department of Health and Human Services comments  
on Labor Department views letter on H.R. 2672,  
"Federal Retirement Reform Act"

REFERENCE: Memo to Multiple Addressees frm OMB,  
dtd 21 Feb 86, Same Subject

We have reviewed the comments from the Department of Health and Human Services forwarded with reference and have no objections to the statements and recommendations contained therein.

**Robert W. Magee**

Robert W. Magee

C/RD/EBS/OF [redacted] (27 Feb 86)

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EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

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*Supp*  
**SPECIAL** *57 Feb*

February 21, 1986

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer -  
Labor Department - Pete Galvin - 523-7713  
OPM - Frances Bolden - 632-4682  
State Department - Torrey Whitman - 647-5158  
Central Intelligence Agency ✓

SUBJECT: Department of Health and Human Services comments on  
Labor Department views letter on H.R. 2672, "Federal  
Retirement Reform Act"

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than February 28, 1986, by telephone.

Questions should be referred to Hilda Schreiber (395-7362), the legislative analyst in this office.

*Naomi R Sweeney*

Naomi R. Sweeney for  
Assistant Director for  
Legislative Reference

Enclosures



THE SECRETARY OF HEALTH AND HUMAN SERVICES  
WASHINGTON, D.C. 20201

The Honorable James C. Miller, III  
Director  
Office of Management & Budget  
Washington, D.C. 20503

FEB 18 1986

Dear Mr. Miller:

This is in response to your request for a report on Secretary of Labor William E. Brock's comments on proposals now before Congress to establish a supplemental retirement plan for new Federal employees hired after December 31, 1983.

At this time, Congress is considering two proposals for a supplemental retirement plan for new Federal employees: a Senate version, H.R. 2672 (formerly S. 1527), and a House version, H.R. 3660. These two versions are now headed for Conference Committee negotiations.

Secretary Brock's letter of January 14, 1986, deals principally with the relationship between employee claims under the Federal Employees Compensation Act (FECA), administered by the Department of Labor, and disability and retirement benefits to be provided under a new supplemental retirement system. These supplemental benefits, administered by the Office of Personnel Management, will augment primary benefits under Social Security, administered by the Department of Health and Human Services.

Secretary Brock's letter requests that any Administration position expressed during Conference Committee negotiations reflect a view that the relationship between FECA and the disability and retirement benefits of a final supplemental retirement plan be parallel to the relationship under other private and public sector plans.

We have several specific comments concerning Secretary Brock's comments on the proper relationship between FECA and Social Security benefits. These are explained in detail in the enclosure. In general, we defer to the Secretary of Labor on the issues he raised, except for the specific items discussed in the enclosure.

Sincerely,

Secretary

Enclosures

Comments on Department of Labor Letter to OMB  
Concerning H.R. 2672

The letter from the Department of Labor (DOL) recommends several changes concerning the treatment of Federal Employees' Compensation Act (FECA) benefits under H.R. 2672--the Senate-passed bill establishing a new Federal civil service retirement system:

- (1) DOL recommends that the bill specifically provide that survivors receiving civil service benefits should elect either FECA benefits or basic civil service benefits. (The bill already requires employees to elect FECA benefits or basic civil service retirement or disability benefits.)

Comment: Defer to DOL. It should be noted, however, that 5 U.S.C. 8116 (attached) already requires such an election for survivors. Presumably, section 8116 would still apply since it has not been repealed by the Senate bill. A clarification would, however, be helpful since the bill specifically addresses treatment of dual entitlement to FECA benefits and civil service disability/retirement benefits, but not survivor benefits.

- (2) DOL recommends that section 306 (DOL incorrectly refers to section 307 rather than 306) be revised so that FECA benefits would not be offset by the amount of Social Security disability benefits attributable to Federal covered employment. They also recommend that a new section be added to the bill providing instead for reducing Social Security disability benefits based on receipt of FECA benefits.

Comment: While we recognize the intent of the bill is to provide consistent treatment of persons receiving FECA benefits and any type of Social Security benefits, we agree that FECA benefits should not be reduced by Social Security disability benefits. Rather, as already provided under section 224 of the Social Security Act, the proper approach would be an offset in the Social Security disability benefit for receipt of FECA benefits. Reducing the Social Security disability benefit (rather than the FECA benefit) would be consistent with the principle that workers' compensation payments are intended to be the primary source of wage replacement in cases of work-related disability and that the financial responsibility for work-related injuries should not be shifted from employers to Social Security taxpayers.

Given that the disability offset provision is already included in section 224 of the Social Security Act, it is not clear why a new section needs to be added to the bill to assure that Social Security disability benefits are offset by FECA benefits.

- (3) DOL recommends that section 306 of the bill be modified so that FECA benefits would be offset by Social Security survivor benefits based on the employee's Federal covered employment-- in the same manner that Social Security retirement benefits would result in a FECA benefit offset under section 306. DOL notes (a) that pursuant to 5 U.S.C. 8116, survivors might have to make an election between their FECA benefits and any Social Security survivor benefits payable based on the employee's Federal employment covered by Social Security and (b) that an offset would be preferable to an election.

Comment: We defer to DOL on whether FECA benefits should be offset for Social Security survivor benefits based on Federal covered employment in the same manner that the bill proposes to offset Social Security retirement benefits. However, it appears to us that the present law provisions in 5 U.S.C. 8116 need to be repealed or modified to accomplish this result since the FECA benefit offset in section 306 does not seem consistent with the election requirement in 5 U.S.C. 8116.

The provision in 5 U.S.C. 8116 presumably would still apply to the FECA benefit provisions as modified by the Senate bill. Under 5 U.S.C. 8116(b) an employee or survivor eligible for FECA benefits and any other Federal benefit based on the employee's injury or death must elect within 1 year after the injury or death to get either the FECA benefit or the other Federal benefit(s). Contacts with DOL staff indicate that while this provision is now being administered to only mean that the person must choose between FECA and Federal civil service benefits, the language in the statute could be interpreted to require an election between FECA benefits and Social Security disability or survivor benefits based on Federal covered employment. (The current interpretation appears to be based on the fact that most Federal civilian employment is not covered by Social Security.)

Since the Senate bill does not amend 5 U.S.C. 8116, and since 5 U.S.C. 8116 and section 306 presumably cannot both apply at the same time to the same case, DOL's letter should acknowledge this and explain their recommendation concerning modification of the provisions in 5 U.S.C. 8116.

- (4) DOL recommends that the offset in section 306 of the bill be triggered by receipt of Social Security benefits rather than potential entitlement to those benefits.

Comment: Do not oppose.

We have no comments on the DOL recommendations concerning ERISA-related aspects of the House and Senate civil service bills.

- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition.

(b) Section 8114(d) of this title is applicable in determining the wage-earning capacity of an employee after the beginning of partial disability.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 542.)

#### HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 763	Sept. 7, 1916, ch. 458, § 13, 39 Stat. 748. Oct. 14, 1949, ch. 601, § 204, 63 Stat. 864. Sept. 13, 1960, Pub. L. 86-767, § 204, 74 Stat. 908.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

#### SECTION REFERRED TO IN D.C. CODE

This section is referred to in sections 31-1803, 31-1823 of the District of Columbia Code.

#### § 8116. Limitations on right to receive compensation

(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except—

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy, or Air Force;
- (3) other benefits administered by the Veterans' Administration unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of title 5, United States Code.

However, eligibility for or receipt of benefits under subchapter III of chapter 83 of this title, or another retirement system for employees of the Government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.

(b) An individual entitled to benefits under this subchapter because of his injury, or because of the death of an employee, who also is entitled to receive from the United States under a provision of statute other than this subchapter payments or benefits for that injury or death (except proceeds of an insurance policy), because of service by him (or in the case of death, by the deceased) as an employee or in the armed forces, shall elect which benefits he will receive. The individual shall make the election within 1 year after the injury

or death or within a further time allowed for good cause by the Secretary of Labor. The election when made is irrevocable, except as otherwise provided by statute.

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 542; Pub. L. 90-55, § 1(56), Sept. 11, 1967, 81 Stat. 210; Pub. L. 93-416, § 9(a), Sept. 7, 1974, 88 Stat. 1145.)

#### HISTORICAL AND REVISION NOTES

##### 1966 Act

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 767	Sept. 7, 1916, ch. 458, § 7, 39 Stat. 742. July 1, 1944, ch. 372, § 805(a), 58 Stat. 712. Aug. 13, 1946, ch. 952, § 8, 60 Stat. 1049. Oct. 14, 1949, ch. 601, § 201, 63 Stat. 861. July 30, 1956, ch. 779, § 3(b), 70 Stat. 721. Sept. 13, 1960, Pub. L. 86-767, § 202, 74 Stat. 907. Sept. 4, 1964, Pub. L. 88-581, § 4(b), 78 Stat. 919.

In subsection (a)(2), "Air Force" is added on authority of the Act of July 26, 1947, ch. 343, § 207(a), (f), 61 Stat. 502, and sections 8010-8013 of title 10, United States Code. This does not affect the operation of this subsection insofar as it concerns members of the Coast Guard whose pension is based in whole or in part on service with the Coast Guard when it operated as a part of the Navy.

In subsection (b), the reference to the definition of "employee" in former section 790 is omitted as unnecessary as the definition is included in section 8101 for the entire subchapter.

Administration of this subchapter was transferred to the Secretary of Labor by section 1 of 1950 Reorg. Plan No. 19, 64 Stat. 1271 (see section 8145).

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

##### 1967 Act

Section of Title 5	Source (U.S. Code)	Source (Statutes at Large)
8116(a)	5 App. 757(a)	July 4, 1966, Pub. L. 89-488, § 5(a), 80 Stat. 253

The words "another retirement system for employees of the Government" are substituted for "any other Federal Act or program providing retirement benefits for employees".

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR  
WASHINGTON, D.C.

January 14, 1986

F5-10/854  
Schultz  
Rec'd LRD  
1-21-86

The Honorable James C. Miller III  
Director  
Office of Management and Budget  
Washington, D.C. 20503

Dear Jim:

I am writing to advise you of our views on H.R. 2672, pertaining to disability and retirement benefits for Federal employees hired after January 1, 1984. This bill is now in conference. We would appreciate inclusion of our views in any Administration communication to the conferees.

Both the Senate version of H.R. 2672 and the bill that will be the basis of the House position in conference (H.R. 3660) build a retirement and disability system for new Federal workers, based on a combination of Social Security benefits and supplemental benefits. They also provide for the establishment of a thrift savings plan by which employees may, if they choose, contribute a certain percentage of their income to an investment fund. For such employees the Government would also deposit to the fund a sum based on a percentage of the employees' contribution.

The Labor Department's primary interest in these bills pertains to their treatment of matters arising under the Federal Employees' Compensation Act (FECA) and the Employee Retirement Income Security Act (ERISA). With regard to FECA, we prefer the Senate bill. With regard to ERISA, we favor the policies currently reflected in both the House and Senate bills.

Regarding the FECA-related provisions of this legislation, we believe that an effective Federal disability and retirement system must have equitable provisions for handling situations where a Federal employee would be eligible for both workers' compensation benefits under FECA and retirement or disability benefits under the Federal retirement system or under other law. Under current law, these situations are addressed in a simple, straightforward manner; individuals must elect to receive either FECA benefits or benefits under the Federal disability or retirement system. They cannot receive both.



- 2 -

The disability and retirement systems contemplated by the Senate and House bills, however, are more complicated and require specificity regarding the manner in which each of their individual elements relate to FECA benefits. The elements of the proposed system are: (1) the basic Federal disability or retirement benefits; (2) the thrift plan; and (3) Social Security benefits. H.R. 3660 does not address the relationship between the elements of the new program and FECA at all. It is, therefore, unacceptable to us. The Senate bill does address these issues and establishes a framework which we believe is essentially equitable and proper. Within this framework, however, the Senate bill leaves some questions open and raises some concerns.

First, while the Senate bill properly continues the current requirement that a person eligible for FECA must elect between receiving FECA benefits and receiving basic Federal disability or retirement benefits, it does not address the election issue with regard to death cases. We assume that in cases of death, the Senate intended an election by survivors between FECA benefits and the basic retirement benefits, but we believe the language of the bill should clearly reflect that intention.

Second, the Senate bill provides that an individual eligible for both Social Security benefits (either retirement or disability) and FECA benefits would receive full Social Security benefits, but would have FECA benefits reduced on a dollar-for-dollar basis for those Social Security benefits which were based on Federal employment. We believe that this is a proper approach for Social Security retirement (OASI) benefits, but is not a proper approach for Social Security disability (SSDI) benefits. Our concern with having FECA benefits reduced when an individual is also receiving SSDI benefits is based on our view of the proper role of a workers' compensation system, which we believe is appropriately reflected in current law and should be retained in the new Federal retirement system.

Current law generally provides that if insurance benefits and workers' compensation benefits total more than 80 percent of pre-disability earnings, SSDI will be reduced. Thus, workers' compensation pays the "first dollar." We favor this approach because, by not reducing FECA benefits, it requires employers to pay for work-related injuries, improves safety incentives, and helps preserve the integrity of the Social Security Trust Fund. The Senate bill, however, would reverse this offset for Federal workers, reducing FECA benefits by the amount of Social Security disability benefits. Thus, the Social Security Trust Fund would in effect subsidize Federal employers whose workers have serious employment-related injuries.

- 3 -

We would therefore recommend that the offset in favor of workers' compensation established by section 307 of the Senate bill be limited to Social Security retirement benefits, and that a new section be added providing for application of the SSDI offset to FECA benefits in disability cases.

Another matter of concern with section 307 of the Senate bill is that it refers only to benefits payable to an employee or former employee. Accordingly, the proposed offset would not apply to survivors' benefits. Pursuant to 5 U.S.C. 8116, however, survivors might have to make an election between their FECA benefits and any Social Security death benefits. We believe the offset approach taken by the Senate bill with respect to employees is preferable to an election, and therefore recommend that section 307 be extended to include survivors' benefits.

We are also troubled by section 307's offset trigger. The language provides for an offset when Social Security benefits "are payable or, upon proper application, would be payable." This language could be interpreted to mean that an employee or former employee receiving benefits under FECA would at age 62 automatically have those benefits reduced by a presumed amount of Social Security benefits even if the employee has elected to delay receipt of such benefits to age 65. We believe the offset should be limited to Social Security benefits actually received.

On the whole, we believe the Senate bill represents a responsible approach to the proper apportioning of costs between the FECA system and the specific elements of the new retirement system contemplated by the bill.

We will now comment on the ERISA-related aspects of these bills. Both the Senate and the House bills include a thrift savings plan. This plan is similar to a private sector defined contribution plan. It is contemplated that the funds accumulated in the Federal plan will be managed in part by private sector investment fund managers who will be plan fiduciaries. Both bills also include a role for the Department of Labor in enforcing the fiduciary provisions governing the thrift plan's investment management system.

The Department believes that the standards governing fiduciary responsibility under the Federal plan should parallel those applicable to the private sector under the Employee Retirement Income Security Act (ERISA). The Federal Thrift Savings Plan will be the largest and most visible thrift plan in the country.

Its beneficiaries should be afforded the same protections as participants in private sector thrift plans, and its fiduciaries should be bound by the same standards of conduct as similar private sector plans.

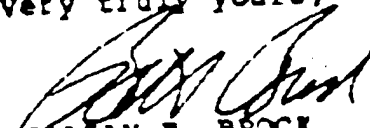
Fiduciary standards similar to those in ERISA are also important for practical reasons. Adopting standards similar to private sector standards will facilitate the Department's regulation and enforcement activities. Standards are well developed and the regulatory structure is in place. ERISA-type standards will also facilitate compliance with the standards for the Federal plan because the private financial community and investment managers are already familiar with the current private sector fiduciary standards.

Finally, the Department favors ERISA-type standards because it feels their value and enforceability have already been well demonstrated. Indeed, great care should be taken in developing standards for the public sector plan because any major conceptual deviation from ERISA's standards could encourage the erosion of the well-established and proven private sector standards.

The House and Senate bills both require the Department to establish programs of compliance audits. Given the size of the thrift plan and the number of participants, the Department believes that such a program of audits is appropriate. However, we feel the administrative burden on the Department should be minimized and that sufficient resources should be provided to carry out these additional responsibilities.

The Department's final concern regarding the thrift plan is that economic considerations--i.e., risk and rate of return--be the basis for making investment decisions. Non-economic investment criteria are appropriate for selecting among investments only if the investment opportunities are of equal economic merit. If a pension plan is allowed to use non-economic criteria as a guide to investment decisions, fiduciary standards become unenforceable. Even more importantly, the use of non-economic criteria for selecting investments will ultimately harm plan participants by lowering investment returns and adversely affecting participants' retirement income security. Both the House and Senate bills currently appear to be drafted to protect plan participants' interest in this important regard.

Very truly yours,



WILLIAM E. BROCK

WEB:gdd